

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JESSICA JONES, MICHELLE VELOTTA,
and CHRISTINA LORENZEN on behalf
of Themselves and All Others
Similarly Situated,

Plaintiffs,

vs.

NO. 2:20-cv-02892

VARSIY BRANDS, LLC; VARSITY
SPIRIT, LLC; VARSITY SPIRIT
FASHIONS & SUPPLIES, LLC;
U.S. ALL STAR FEDERATION, INC.;
JEFF WEBB; CHARLESBANK CAPITAL
PARTNERS, LLC; and BAIN
CAPITAL PRIVATE EQUITY,

Defendants.

EXPEDITED TRANSCRIPTION
VIA FTR RECORDING
BEFORE THE HONORABLE TU PHAM
UNITED STATES MAGISTRATE JUDGE

CANDACE S. COVEY, RDR, CRR
OFFICIAL REPORTER
FOURTH FLOOR FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

UNREDACTED TRANSCRIPT

A P P E A R A N C E S

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THE COURT: All right. I think it's recording now. Good afternoon everyone. I'm Judge Pham. We're here in the Jones versus Charlesbank and Bain matter. That has been referred to me for resolution of the motion to compel, and I apologize to delay. I know there are a lot of attorneys who are scheduled this afternoon, and I got an e-mail right at noon that there was a COVID contact issue which required me to leave the office and go home. So here I am. So I wanted to build in some delay time so I can drive home and start up this hearing. But I did want to keep it on the calendar because I know the parties were preparing for it.

So let me have a roll call at this time, first on behalf of the plaintiff.

MS. MALONE: Good afternoon, Your Honor. Katharine Malone for the Jones plaintiffs. I'm with the Joseph Saveri Law Firm.

THE COURT: Okay. Next?

MR. COOPER: Good afternoon, Your Honor. Sean Cooper from Paul LLP, also on behalf of the Jones plaintiffs.

THE COURT: Okay.

MS. SPIEGEL: Ronnie Spiegel with Joseph Saveri

1 Law Firm, also on behalf of the Jones plaintiffs.

2 THE COURT: All right. Anyone else?

3 Okay. For the defendants?

4 MR. KAISER: Good afternoon, Your Honor. This is
5 Steve Kaiser on behalf of Charlesbank and Bain, and Matt
6 Mulqueen from Baker Donelson in Memphis is with me as well.
7 He can introduce himself.

8 MR. MULQUEEN: Good afternoon, Your Honor.

9 THE COURT: Hello. Okay. Anyone else for the
10 Bain or Charlesbank defendants? Like I said we have several
11 other people here who I assume are on related cases
12 representing different parties. I don't think we need to go
13 through that list.

14 Okay. So I did get the e-mail from the parties.
15 Although it doesn't appear, unless I'm missing something,
16 that there really had been any progress from where you all
17 were before. So I guess we'll start from square one. Let me
18 hear just brief opening comments from the plaintiff and then
19 defendants, and then we'll get into the parties' positions as
20 to the discovery requests, scope of discovery and all those
21 issues. On behalf of plaintiffs?

22 MS. MALONE: Thank you, Your Honor.

23 Good afternoon. We're here today because we have
24 a philosophical difference with Charlesbank and Bain
25 regarding their party discovery obligations. The banks have

1 taken the position that because they believe they'll win
2 their pending motions to dismiss, they shouldn't have to
3 participate in discovery. We, however, agree with Judge
4 Lipman who stated in the Fusion case when this argument was
5 made over a year ago that discovery should go forward even in
6 the face of pending motions to dismiss.

7 Her words were, "I am not inclined to stay
8 anything pending a motion to dismiss. It's not the way I
9 view my role as the Judge in pushing cases and moving people
10 toward resolution. I hate doing it. I only do it when
11 basically the law tells me I have to in qualified immunity
12 cases or, you know, arbitration clauses from time to time
13 force me to do that. But otherwise, I'm just not inclined to
14 do it. I don't think it's appropriate. I think setting
15 aside time where the Court is dealing with the motion to
16 dismiss just frankly, I think, takes lawyers off the hook,
17 and I'm not inclined to do that."

18 So how did we get here? The Jones plaintiffs
19 served narrowly tailored document requests back in May.
20 Since then we have diligently met and conferred with the
21 defendants in good faith to try and narrow them and reach an
22 agreement. During that process we've reached agreement on
23 several of the requests, search terms and three custodians.

24 So the dispute here today is over the appropriate
25 custodians for ten outstanding requests. Three requests

1 themselves and the relevant time period for Charlesbank.
2 We've run into an impasse there, again and again, and we're
3 just not making any progress.

4 To date defendants have produced a handful of
5 insurance policies in this litigation and zero documents
6 responsive to our requests. So we filed motions to compel on
7 September 18th. We've continued to meet and confer since
8 then but have made no progress. And any attempts to identify
9 interim productions that defendants would agree to make has
10 been unsuccessful. So the requests have been sitting out
11 there for months. The window of discovery is closing, and we
12 need a ruling from this Court to move forward.

13 The defendants are arguing that the burden here
14 is unreasonable. And it's not. You know, as I just
15 explained, there's no actual burden to date. They have
16 produced 23 insurance documents and, you know, made a handful
17 of documents produced in the Fusion litigation, which were
18 basically just highly redacted noncustodial PowerPoints
19 without metadata.

20 What we're asking for here isn't unduly
21 burdensome, given the highly relevant nature of the materials
22 we're asking for. We're not asking to run broad searches on
23 the entire company. We're only asking to apply the narrow
24 search terms the defendants have already agreed to. Just a
25 few more custodians. Specifically six from Charlesbank and

1 eight from Bain. We're not asking for the moon, just
2 documents responsive to the party requests that have been
3 narrowed as much as they can, given the information that we
4 have available.

5 I don't want to launch into, you know, request by
6 request and custodian by custodian in defendant unless the
7 Court would like me to at this point.

8 THE COURT: Let me let the defendant respond
9 first, and then we'll get started with that.

10 MR. KAISER: Good afternoon, Your Honor.
11 Ms. Malone just said some incredible things, one of which is
12 that the requests are narrowly tailored. One of the requests
13 literally says all documents and communications referring or
14 relating to ownership and operation of Varsity. If that's
15 narrowly tailored, I guess there's nothing that's not
16 narrowly tailored because that is literally everything under
17 the sun. And I would add that when we asked them just even
18 as recently as last Monday to narrow that to something that
19 we could actually deal with, something specific that they
20 think they don't have, they basically refused to engage.
21 Essentially hung up on us.

22 So to say it's narrowly tailored is wrong, and I
23 think that's where it all starts. It all starts with -- and
24 this has been going on in this case not just with this issue.
25 There are third parties all over the country that are saying

1 the same thing to courts all over the country about how these
2 requests are impossible to deal with. You know, the requests
3 that everyone is facing, these everything about everything
4 requests that these plaintiffs keep issuing, and we find
5 ourselves in the same spot.

6 Now, not only do they want everything about
7 Varsity, they also want it from 17 custodians. Now, just to
8 put that in context, the 14 plus the three that they say we
9 agreed to, which isn't really true, but there's 17 total
10 custodians at issue here. To put that in context, the entire
11 number of Varsity custodians, in other words, the company
12 that actually is alleged to have done something in this case
13 who have produced documents, including under agreement with
14 these plaintiffs is 20. So 17 from owners who have been
15 dismissed from the parallel case. 17 custodians. 20 from
16 the actual party that actually is alleged to have done
17 something in this case.

18 So clearly it's breathtakingly disproportionate
19 to what the needs of the case, which is what the federal
20 rules require it not to be. In other words, it has to be
21 proportionate. There is no proportion here. This is
22 completely disproportionate.

23 As far as what's been produced, what Ms. Malone,
24 I think, was alluding to, was a subpoena that their
25 co-plaintiffs Fusion Elite issued. We responded to that. It

1 was the same broad request, but we worked with them to -- we
2 put our responses in, and they accepted what we produced,
3 which was presentations made by our two Varsity by -- well,
4 by Varsity or to Varsity from the Bain or Charlesbank, as the
5 case may be. As well as third party presentations, which is
6 well in line with the allegations in this case.

7 And let me just say one thing about those
8 allegations. What they allege in this case is that Bain and
9 Charlesbank owned Varsity. That's their basic allegation.
10 And that's true. It's not disputed. But Judge Lipman looked
11 at that and said that's not enough to have a claim against
12 Bain and Charlesbank. So what does that mean? It doesn't
13 mean staying discovery. But what it does mean is that their
14 discovery has to be tailored to what might be relevant to the
15 claims that are going to remain in this case. Not to some
16 other claims that they have and they're not going to be able
17 to sustain.

18 So it's incumbent upon them to show relevance in
19 all respects. They failed to do that. When we try to get
20 them to narrow it to relevant things, to get it in line, to
21 take account of what they've already received, to tell us
22 what you're missing, tell us what you think you need, they've
23 just refused to engage. Now, that's their right. They can
24 bring this issue to the Court. That's fine. But that's the
25 history and the back story that gets us to here.

1 And one really needs to look no further than
2 Request 5, which, despite being called narrowly tailored,
3 even today, asks for all documents and communications
4 referring or relating to your ownership and operation of
5 Varsity, which is everything. There is no tailoring at all
6 of that.

7 So that's where things stand. We think again
8 that the Court should set this aside like Judge Claxton said
9 she would do and let the motion to dismiss play out. But if
10 not that, then the Court should look at our objections
11 request by request. See what's left. And then we can either
12 discuss with the plaintiffs, or the Court can rule on their
13 extraordinarily broad requests for sources and things of that
14 nature, which is kind of the secondary question. In other
15 words, custodians and other things of that nature.

16 THE COURT: Well, as I mentioned at the last
17 hearing, there's not an order to stay discovery as it relates
18 to these two parties, and there's not even a motion to stay
19 that's been filed. So there's not really a option, as I see
20 it, for the Court at this time. Now, in reviewing the
21 transcript when you all had the hearing, motion hearing
22 before Judge Claxton, seemed like there were several motions
23 that were on the table at the time. And it had seemed like
24 from the comments from her hearing that she had set aside the
25 bank and -- sorry -- the Bain and the Charlesbank related

1 motions in that there are other motions that she was having
2 to deal with. And also the Order of Judge Lipman dismissing
3 these two parties from the other matter had just come out.

4 All that to say is that as I referenced before,
5 unless there's an order staying discovery as to these
6 parties, I'm not inclined to stay discovery. And the portion
7 of the conference before Judge Lipman that Ms. Malone read
8 would -- as I mentioned before, would be consistent with my
9 interpretation of not just Judge Lipman but all of our trial
10 judges insofar as their approach to discovery is that the
11 general practice has been to move forward with discovery.

12 Now, I don't disagree with Mr. Kaiser that there
13 is an order in the somewhat related case which these two
14 defendants have been dismissed. And that may or may not be
15 the outcome in this case. But until that order comes out,
16 they're still parties in the case. And assuming that it
17 comes out the way that Mr. Kaiser believes it will, it's
18 still part of the case. And the case would have to proceed
19 with discovery.

20 So I saw that mentioned several times in the
21 e-mail that I received on Friday from the parties as being
22 one potential hangup. But I don't really see that as being
23 an obstacle to moving forward with the motion to compel. And
24 I guess I was still -- I was surprised that that apparently
25 was still an issue with the parties even after our conference

1 from last time, that somehow that was still an obstacle to
2 moving forward with the discussions.

3 MR. COOPER: I mean, Your Honor, I don't think
4 it's an obstacle at all. I think we recognized what you
5 said, and we respect it, of course. But what we would say is
6 that putting that aside, just forget about it. Never mention
7 it again. The fact is we're facing a request for
8 17 custodians times a topic that's all documents and
9 communications referring and relating to your ownership and
10 operation of Varsity.

11 So we're fully prepared and would very much like
12 to go through these requests, talk about what's appropriate
13 under the federal rules for parties, given the allegations,
14 the limited allegations against Bain and Charlesbank and what
15 is really appropriate. And given the massive amount of
16 discovery that's already taken place in this case. So there
17 should be no impediment to that. And we tried to have that
18 conversation with them a week ago, and they weren't
19 interested, which is fine, but that's where we are.

20 THE COURT: All right. Then with that, let's
21 move forward with I'll go to -- I think it's easier just to
22 refer to the parties' e-mail. Although where appropriate, we
23 can refer back to the underlying motion and the attachments.
24 But as to the initial requests, Request Numbers 2, 3 and 4,
25 then there's a disagreement, an ongoing disagreement about

1 who the custodians should be as to these requests. I'll hear
2 from the plaintiffs.

3 MS. MALONE: Yes, Your Honor. You know, the
4 defendants keep referring to 17 custodians. Actually, at
5 Bain it's nine. And we -- yeah. They tell us that, you
6 know, we have the wrong people but won't tell us who those
7 people are. We've asked for documents sufficient to identify
8 the people who were involved, you know, in the acquisition
9 analysis and the operational management to Varsity, you know,
10 who sat on the board. Like, I mean, the people who were
11 involved in critical decision making and who were doing, you
12 know, the front line analysis. And they've just refused to
13 provide it. We've asked for it informally.

14 You know, we are interested in getting
15 information from, you know, relevant custodians, you know,
16 who -- or custodians who will have relevant information in
17 their files. And so we don't want to go on a wild goose
18 chase either. And so identifying the exact people who would
19 have responsive information seems like an entirely justified
20 set of requests.

21 THE COURT: All right. Well, who are the three
22 people that you think -- although it sounds like Mr. Kaiser
23 may not agree with this. The three people that you all think
24 are custodians as to this defendant Bain and these requests.

25 MS. MALONE: So for Bain, Your Honor, it's the

1 only custodian that the defendants, you know, have agreed or
2 engaged in any discussions with is Ryan Cotton, who is the
3 head of Bain.

4 THE COURT: Okay. So were there two others?
5 Maybe I misunderstood then what you said and Mr. Kaiser's
6 response.

7 MS. MALONE: Yes, Your Honor. So Mr. Beer and
8 Mr. Janower are also high level directors at Charlesbank, and
9 they were agreed to or, you know, but yes, tentatively agreed
10 to as custodians.

11 THE COURT: So this is for defendant Charlesbank,
12 not for Bain?

13 MS. MALONE: Well, so Charlesbank has a list or
14 published a list of, you know, key team members for Varsity
15 on their website. And so between that, you know, other
16 public information, you know, an analysis and review of the
17 third party productions that have been made. That's how we
18 came up with the list of people that we think, you know,
19 would contain relevant information. You know, they sat on
20 the board. We know that they were involved, you know, again,
21 from e-mails. You know, going outside of the banks, but they
22 were involved in operational management. So that's for
23 Charlesbank.

24 But for Bain we don't have that, you know,
25 identified list from them. So you know, it's from the same

1 sources. It's, you know, the publicly available (inaudibly)
2 under third party productions. So you know, we would like
3 the defendants to identify the individuals that they think
4 have responsive information. If it's not the list that we've
5 put together.

6 THE COURT: Well, okay. I'll let Mr. Kaiser
7 respond. But so did y'all have this conversation before?
8 Like here's my list. Here's what I'm basing it on to which
9 the other side would say well, I think your list is
10 overbroad. I think it should be just these four because
11 these other two -- I mean, did you have that conversation?

12 MS. MALONE: Yes, Your Honor, we did. And --
13 yes.

14 THE COURT: That should result in something, I
15 would think, right? Something besides diametrically opposed
16 positions as it would appear from your e-mail.

17 MS. MALONE: You would think, but no.
18 Defendant's position as far as I understand is that, you
19 know, there may be some duplicative documents between, you
20 know, the various custodians at each bank, which, you know,
21 is to be expected, you know, when you're working on a team
22 and people are copied, but it ignores the reality of e-mail
23 threads where people are dropped and added and, you know, the
24 way that documents are revised and instructions are given.
25 So yeah, there's been no explanation beyond we think that

1 some of the documents may be duplicative between files given
2 to us.

3 THE COURT: Okay. So you all agree on Ryan
4 Cotton so far is the only one that you agree on.

5 MR. KAISER: Your Honor, could I be heard on this
6 because I think we're heading off in a very incorrect
7 direction here?

8 THE COURT: Okay. Correct me, Mr. Kaiser, as to
9 what you think the right approach is because evident from the
10 e-mail between the parties that was submitted to me late
11 Friday, there doesn't seem to be much direction here.

12 MR. KAISER: Well, we have Requests 2, 3 and 4,
13 and they've characterized them to the Court as we're supposed
14 to give them documents sufficient to show who are the key
15 people at Bain and Charlesbank. That's how they've described
16 their requests, which I assume is what they're after here.
17 We've given them a sworn declaration about who was the key
18 person at Bain, which is Ryan Cotton.

19 And that -- so when they say we've never engaged
20 with them, I know Ms. Malone wasn't involved in this case
21 until a few weeks ago. But we've been talking to these folks
22 for months and months. And Ryan Cotton's been known about
23 for months and months. He issued to this Court sworn
24 testimony that they don't dispute that says he was involved
25 in all or nearly all of the substantive communications at

1 Bain involving Varsity's cheerleading business from the time
2 of Bain's due diligence exercise in the Varsity acquisition
3 forward.

4 So you know, they're asking for who the key
5 employee is, and they're saying we're not telling them. But
6 yet we've submitted to the Court a declaration that says this
7 is -- I mean, essentially it says this is the key employee.

8 We asked them on Monday what they mean by key,
9 and they wouldn't engage in that. They wouldn't even tell us
10 what they meant. Now, she said a little bit more today.
11 What I heard today was well, anybody that had anything to do
12 with Varsity. But that seems completely overbroad and over
13 the top, considering all that Bain is alleged to have done is
14 own Varsity. And there's no allegations that they did
15 anything else.

16 So for us to try to go down and try to figure out
17 every single person who ever touched Varsity while at Bain is
18 expensive. It's disproportionate, and it's unnecessary. And
19 in any event, you know, if they're talking about the key
20 person, that's Ryan Cotton, as we've said to the Court, as
21 they've known for months and months.

22 So that's why I say it doesn't seem -- these
23 Requests 2, 3 and 4 don't seem to be going down the right
24 road because this isn't a question of who might have material
25 about Varsity. Now, that could be another question. But the

1 question that they put before the Court is who are the key
2 people. The key people at Bain and Charlesbank, and those
3 people have been identified a long time ago.

4 THE COURT: All right.

5 Response, Ms. Malone?

6 MS. MALONE: Yes. So a couple points. First of
7 all, you know, key people means, I mean, it's a pretty
8 well -- pretty frequently used word. I mean, yeah. These
9 are the people who were involved in, you know, decision
10 making and, you know, operational management. And who are
11 on, you know, the board of records. I mean, we've described
12 this. I don't think it's a, you know, confusing verbiage.

13 But, I mean, also key doesn't mean single person.
14 Key doesn't mean, you know, the one individual, you know, who
15 may have been highest ranking or, you know, the only person
16 directing things. I mean, even the statement that was just
17 made. You know, he was involved in nearly all of the
18 substantive communications sort of necessarily implies that
19 there was substantive communications that, you know, he may
20 not have been on. And, you know, documents that he may not
21 have in his custodial file that will absolutely be responsive
22 and relevant to, you know, investigating the claims here. So
23 I think, you know, the suggestion that, you know, all of the
24 relevant information and the totality of relevant documents
25 is going to run through one person. It's just not realistic.

1 THE COURT: Let's talk -- we'll take this one at
2 a time. Josh Bekenstein. Am I pronouncing that right?

3 MS. MALONE: Uh-huh.

4 THE COURT: All right. Ms. Malone, what is the
5 plaintiff's position as to why you believe that he may be a
6 key person and whose records may be pertinent so far as one
7 of more of these document requests?

8 MS. MALONE: All right. So Josh Bekenstein, you
9 know, was a key player in, you know, the consumer and retail
10 businesses of which Varsity was one. So he would have all
11 sorts of knowledge about, you know, the verticals there and,
12 you know, the analysis of, you know, why Varsity would be a
13 good acquisition. You know, the ways in which, you know, the
14 company could continue to, you know, leverage the market
15 power and market share that they had and increase profit
16 margins, I mean, and which go to the center of our
17 allegations, right? We've alleged that Bain, you know,
18 conspired and, you know, used the market power that Varsity
19 had by 2018 to raise, stabilize and fix prices. So he'll
20 absolutely know about that.

21 MR. KAISER: Can I respond to Josh Bekenstein,
22 Your Honor?

23 THE COURT: Ms. Malone, were you done?

24 MR. KAISER: I'm sorry. I thought she was moving
25 on.

1 THE COURT: Ms. Malone?

2 MS. MALONE: No. I don't -- I mean, I...

3 THE COURT: Were you finished?

4 MS. MALONE: Yes. Yes, Your Honor.

5 THE COURT: Okay.

6 You may respond.

7 MR. KAISER: So Your Honor, again, before the

8 Court is sworn testimony or a sworn declaration that

9 Mr. Bekenstein's only involvement really with Bain was to

10 attend board meetings, which Mr. Cotton also attended as a

11 board member. Otherwise, he was just a high level advisor

12 during the time of Bain's acquisition and is not involved in

13 the day-to-day aspects of Bain's ownership of Varsity.

14 So everything Ms. Malone just speculated and

15 guessed about is just not correct based on the sworn

16 testimony. And then also Mr. Cotton says, "I believe I would

17 have received any substantive documents regarding Varsity's

18 cheerleading business that Mr. Bekenstein authored or

19 received." So there's no -- you know, the evidence is

20 there's no cause for Mr. Bekenstein to be involved in this.

21 I mean, we can speculate forever that people have things or

22 whatever, but this is the evidence before the Court.

23 THE COURT: And if you can remind me, I know

24 there are a lot of moving parts in all these cases. Has

25 Mr. Cotton been deposed, or has there been a 30(b)(6)

1 deposition yet as it relates to this issue of custodians and
2 people who might have relevant documents? And I guess in
3 particular his declaration whether Mr. Cotton's been
4 questioned about a declaration.

5 MS. MALONE: No, Your Honor. No. I mean, since
6 we haven't received any, you know, responsive documents to
7 our requests, it would be a challenge to sufficiently depose
8 someone in the absence of, you know, materials.

9 THE COURT: Right. Well, so he has not been
10 deposed on declaration?

11 MS. MALONE: No, not yet.

12 THE COURT: Okay. In which case, the question is
13 to be asked of him regarding these other individuals and what
14 information they may have that hasn't been asked, correct?

15 MS. MALONE: Yes.

16 THE COURT: Okay. All right. Anything further
17 regarding Mr. Bekenstein?

18 MS. MALONE: Well, Your Honor, just that, you
19 know, we -- I don't want to veer into protected material.
20 You know, we are aware that he was involved in, you know,
21 operational management and, you know, was copied on e-mails.
22 So this isn't just wild speculation. It's, you know,
23 grounded in fact and substance.

24 MR. KAISER: Your Honor, to the extent they
25 brought those e-mails to the Court's attention, they were all

1 e-mails that Mr. Cotton was copied on. So it just is
2 completely inconsistent with what he said in Mr. Cotton's
3 declaration.

4 THE COURT: Well, just because Mr. Cotton would
5 have been copied on e-mails, along with other individuals
6 doesn't necessarily preclude a party from obtaining those
7 e-mails to -- even to the extent they're identical, of other
8 people who have gotten those e-mails, Mr. Kaiser. Now,
9 that's a factor, right? I mean, we don't want the parties to
10 engage in unnecessary discovery when all the relevant
11 documents or most of them would be with one or two
12 custodians, but the fact that someone else has been copied on
13 it by -- well, first of all, by itself is not evidence that
14 that person would not have other e-mails and other
15 information. But it's not the -- that doesn't conclusively
16 demonstrate that that person, those other custodians
17 shouldn't have their files subject to search.

18 MR. KAISER: I would agree with that in the
19 abstract, but here we also have sworn testimony from
20 Mr. Cotton himself saying that he, that he, Mr. Cotton,
21 received any substantive documents regarding Varsity's
22 cheerleading business that Mr. Bekenstein authored or
23 received. And the reason for that is is Mr. Bekenstein was
24 very tangential to this whole thing. And therein lies the
25 issue. Mr. Cotton is the person -- I mean, first of all,

1 bear in mind that Bain has only owned this company for a
2 couple years. And Mr. Cotton has been the person from day
3 one. He's been on the board from day one. He's been the
4 guy.

5 So he's telling this Court under oath, under
6 sworn testimony, under penalty of perjury that he has the
7 documents. And again, I don't think this, you know,
8 personally I think when the request is all documents relating
9 to Varsity, and the response is well, he could have a
10 document relating to Varsity, Mr. Bekenstein or one of these
11 other people, I can't say that's not correct. It's
12 undoubtedly true. But at the same token, that's not a proper
13 scope of discovery in the first place. This discovery should
14 be very narrow to the allegations in the complaint, and we're
15 not even in the neighborhood of that.

16 But in any event, as far as Mr. Bekenstein is
17 concerned, I can only say what the record is before the
18 Court, which is what Mr. Cotton said and was the fact that
19 all they've put before the Court is completely inconsistent
20 with that, which is a few documents which he was copied on
21 with Mr. Cotton that are not specific to Mr. Bekenstein, as I
22 recall. I think they were both copies of board distributions
23 or something like that. But I do take your point, for sure.

24 THE COURT: All right. Jay Corrigan.

25 MS. MALONE: Jay Corrigan was the CFO. He was an

1 authorized signatory on any agreement with, you know,
2 Varsity's -- the holding company associated with Varsity.
3 And so, you know, we believe that he would have documents,
4 you know, reflecting Bain's view of Varsity's competitive
5 position and valuation prior to the acquisition as well as,
6 you know, documents reflecting Bain's influence over
7 Varsity's operations.

8 MR. KAISER: Your Honor, as for Mr. Corrigan,
9 again, sworn testimony before the Court is that he was not
10 part of the deal team for Bain's acquisition of Varsity. As
11 an officer of Bain, he may have signed a deal agreement at
12 the end of the day, but the acquisition of Varsity by Bain is
13 not alleged to be illegal. It's not really an issue before
14 this Court.

15 So to try to sweep the CFO of Bain -- not the CFO
16 of Varsity, the CFO of Bain into this case on such a thin
17 basis, it's just, again, disproportionate. There's been no
18 showing that he's going to have much of anything in the way
19 of even responsive documents, even in that really broad
20 request that they have. But the evidence is that he's not --
21 he's far out on the tangent, even worser than Mr. Bekenstein.

22 THE COURT: All right. Ms. Malone, just going
23 through your filing and the specifics, I mean, I have it in
24 front of me. I've read it. I'm rereading it again. Is
25 there anything that you want to add on behalf of the

1 plaintiffs that go outside or supplement what was submitted
2 to the Court regarding each of these custodians that you
3 believes files should be subject to some amount of search?

4 MS. MALONE: Yes, Your Honor. You know, I think
5 the matter has been briefed pretty fully, but, you know, I
6 think it's important to just recognize, you know, that third
7 party productions have been made by other banks in the Fusion
8 matter. And Charlesbank and Bain have made third party
9 productions in that action as well. But it's literally a
10 handful of like highly redacted PowerPoints without any
11 metadata and any information, you know, beyond just an image.

12 You know, the only group of documents that hasn't
13 been produced in this litigation is the internal bank
14 discussions, you know, that would have related to valuation.
15 About whether or not it made sense to make the investment.
16 You know, the goals of the investments. You know, how the
17 banks understood, you know, their role, you know, in guiding
18 or operating Varsity. You know, what their plans were for
19 acquired market share and how they were going to do that.
20 When they knew about, you know, Varsity's, you know, intent
21 to acquire all of its rivals.

22 I mean, there are key questions that really go to
23 the heart of this case that are only available in this
24 tranche of documents. And, you know, the individuals that
25 we've identified, you know, look, it's entirely possible that

1 more people at, you know, either Charlesbank or Bain, you
2 know, have responsive documents. We're not asking for a
3 search of the entire company. It's just these individuals
4 that, you know, we have a reasonable and well-founded belief.

5 You know, were substantially involved in this and
6 have, you know, relevant knowledge and relevant files and
7 responsive content as custodians. And so, you know, we're
8 sort of being asked to piece together, you know, a puzzle and
9 like asked which pieces were missing without even having
10 opened the box.

11 And so we just -- getting the intrabank
12 communications is necessary. And, you know, the
13 communications, I mean, will necessarily involve a group of
14 people, some of whom, you know, will be subordinate and
15 report to others. But those will be the people who are
16 doing, you know, front line analysis and, you know, the
17 initial drafts of documents and reports, and, you know,
18 charting that evolution is also key to proving our claims,
19 so...

20 THE COURT: Okay. Well, I guess, again, I go
21 back to my question it doesn't sound like, though, that
22 there's anything you want to add. I don't want to go through
23 each of these. I have the briefing. And I have the party's
24 position on the key individuals. And it's obvious y'all
25 don't see eye to eye. That's fine.

1 Then I'll step in and I'll decide whose files to
2 be searched. If you can't -- have y'all even agreed on the
3 search terms as it relates to each -- what the protocol would
4 be so far as how you would search whenever you decide who
5 these key individuals are, I mean, the custodians, how you
6 would -- what search term to use?

7 MS. MALONE: My understanding, Your Honor, is
8 that we have agreed to a limited set of search terms. So I
9 don't know if Mr. Kaiser disagreed but misunderstood that
10 earlier. But my understanding is that yes, we have.

11 THE COURT: Okay.

12 MR. KAISER: Your Honor --

13 THE COURT: Is there someone else who was
14 involved in developing the search term protocol?

15 MS. MALONE: Yes. I mean, I've reviewed the
16 correspondence, and I believe we ran it to ground. But yeah,
17 I wasn't involved in the search term protocol but, you know,
18 my review of the correspondence and, you know, based on
19 conversations with those individuals, yeah. We have settled
20 on a set of search terms.

21 THE COURT: All right.

22 I'll let Mr. Kaiser respond. My follow-up
23 questions were going to be well, what are those search terms?
24 Have y'all agreed to conduct a global search term approach
25 where it would hit on all or at least various categories of

1 these requests, or are they specific to each request? There
2 are different ways that the parties have handled this. And I
3 don't know what you all have agreed, if there is agreement,
4 as to how that is approached on these discovery requests.

5 Anyone? Mr. Kaiser?

6 MR. KAISER: Yeah. So as far as search terms are
7 concerned, in an effort to accommodate the plaintiffs, they
8 did propose some search terms. We proposed some search
9 terms. And we did reach a point, at least with respect to
10 Mr. Cotton that if we were to reach an agreement as to end
11 this entire ordeal of, you know, these discovery requests by
12 doing Mr. Cotton for the period of time we had proposed, we
13 would use search terms that we agreed on. In other words, we
14 agreed to that extent on search terms.

15 Now, if we're going to be, you know, multiplying
16 this by a factor of six or seven, I think we would seriously
17 need to reconsider that because obviously when you multiply
18 that by so many, it's going to be a lot of additional
19 documents. Not additional responsive documents, I don't
20 think. Just additional nonresponsive documents because the
21 terms were pretty broad.

22 With Cotton we were willing to do it in an effort
23 to resolve this whole thing. They've not really been
24 interested in resolving this whole thing. So I don't know
25 that that would be appropriate for the other -- for any

1 others. And obviously, I don't think there should be any
2 others. But if there were, I think we would need to
3 reconsider that issue.

4 THE COURT: Well, the search terms that
5 apparently have been agreed on regarding Ryan Cotton, were
6 they directed to specific discovery requests and how that
7 would be produced in response to requests, or would it be a
8 global production in which maybe a term search could be
9 conducted within the medium that it's produced in?

10 MR. KAISER: Yeah. That's a fair question. In
11 this particular instance because Request 5 basically subsumes
12 every other one of the requests, this request for every
13 document about Varsity. There really wasn't a whole lot of
14 purpose to doing a request by request set of search terms
15 because we were again trying to reach an agreement that would
16 have put an end to all this, and in that context, we were
17 willing to do it their way.

18 But if Request 5 were modified to something
19 sensible or that actually covered some of the things that
20 Ms. Malone just mentioned, as opposed to just every single
21 scrap of paper about Varsity, then, of course, you know, we
22 would have to consider search terms and whether they're still
23 appropriate. I may be speaking slightly out of turn here.
24 My sense is we could probably reach a conclusion on that
25 without troubling the Court anymore. But I can't say that if

1 we have to do, you know, Request 5 as written times
2 17 custodians that we would be content with the search terms
3 that we had discussed with the plaintiffs before.

4 THE COURT: And I do want -- I typically do, upon
5 ruling on a motion to compel, direct the parties to meet and
6 confer regarding search terms once the scope of discovery is
7 set by the Court. I'm concerned, though, that given the lack
8 of progress so far on this particular case and that the clock
9 is ticking and I know last time we talked, there were a bunch
10 of depositions that were trying to be scheduled and so many
11 parties on the case, that I may just set the search terms,
12 and let the chips fall where they may, in which case if it
13 ends up costing a lot, then it costs a lot. If it ends up
14 missing a lot, then it misses, but I've given the parties
15 more than a fair chance to work it out.

16 And just to be clear, that's usually my MO is I
17 do want the parties to work it out, but when they've shown
18 that they're, for whatever reason, haven't been able to do
19 that, then I just step in and I decide it, and that's that.
20 And, you know, if it ends up getting way too much, and it's
21 overinclusive, then so be it. If it turns out that my
22 decisions on search terms is under inclusive and it misses
23 smoking guns, so be it. That's the way that ESI will work
24 once it gets to this late stage.

25 MS. MALONE: Your Honor, actually if I can just

1 add, I actually believe that Mr. Kaiser misspoke. We have
2 paired search terms with each request. The dispute is just
3 over the number of custodians.

4 THE COURT: Well, that's not what he just said.

5 MS. MALONE: Yeah.

6 THE COURT: So I think he just said that it was
7 actually agreed upon with the understanding that it would be,
8 at least from his perspective, and I'll let Mr. Kaiser
9 respond, but I heard that it was an understanding that would
10 really be limited to Mr. Cotton, which is a far cry from
11 where you're at right now with all these other custodians.
12 And that his position is that if it is expanded to beyond
13 what his client's position is regarding who should be the
14 relevant custodians, then it might not still be a viable
15 option.

16 MS. MALONE: Right. So if I may respond to that.
17 So it is true that the search terms that were agreed to were
18 for Mr. Cotton. However, they were tailored to each request.
19 So it's not, you know, global set of searches that run across
20 each request. And, you know, certainly if defendants want to
21 run a search report and present us with it we, you know, we
22 too are not interested in, you know, reviewing a bunch of
23 unnecessary, nonresponsive documents and would happily work
24 with them to narrow that so that they're only producing
25 things that hit and are useful to everyone.

1 THE COURT: Well, I mean --

2 MR. KAISER: The question is for every --

3 THE COURT: I'll let you respond in just a
4 second, Mr. Kaiser.

5 MR. KAISER: Sorry.

6 THE COURT: I'm concerned that that will result
7 in further delay. You know, these other cases have moved.
8 And I know that isn't necessarily the determining factor, but
9 it's important here. I think we've got a lot of attorneys
10 involved and a lot of moving parts, and my concern is that
11 this case is going to fall behind. It has a little bit
12 already.

13 I know there's been a motion as it relates to the
14 current defendants, and I haven't lost sight of that. But I
15 don't want this case to move much slower than it already has
16 and as it relates to the other parties. And so I'm concerned
17 that once I rule on this, and it's based upon what's occurred
18 so far, I'm not going to be ruling from the bench. I would
19 normally do that, but that's -- this is not progressing in a
20 way that I had hoped.

21 So I'm going to rule on this. And if I rule on
22 that, then I don't know if it makes sense for me to have
23 another meet and confer and say okay, well, now in light of
24 this, agree with the search terms and come back. And before
25 we know it, we're into January, and we're still fighting over

1 this. And I don't want that to happen.

2 So at some point when the Court has to get
3 involved with actually determining the search terms, which I
4 will say can get messy, and that's just because it is what it
5 is. Then but I think that I have to weigh that against the
6 need for this case to move.

7 MR. KAISER: Your Honor, I might suggest this on
8 search terms. Frankly, we're at a loss because, you know,
9 we've presented evidence. We've talked to the plaintiffs.
10 We know who the three guys are. I don't know why they
11 continue to ask for more. These companies did not have that
12 much involvement in the case as alleged in the complaint and
13 as a matter of fact. And then, you know, I guess they see
14 them as deep pockets or whatever. It's obviously their right
15 to do what they want.

16 But at the same time again, 20 custodians for
17 Varsity, which was the actual entity that did the things that
18 are alleged in the complaint. Or not they didn't do them,
19 but they're alleged to have done them. And then, you know,
20 17 custodians for their owners over the years, which just
21 seems completely out of proportion, and something is wrong
22 with that.

23 As far as the search terms, in particular though,
24 I believe that chances are we would do the search terms for
25 any custodians, the search terms we discussed, but we have to

1 have a little bit of a safety valve if something goes haywire
2 because we are getting in, you know, beyond the three, we're
3 into people who really didn't have a whole lot to do with
4 Bain -- with Varsity rather. So any hit is almost invariably
5 going to be a false hit. So it's going to be, you know, a
6 pretty big waste of time.

7 Now, but I don't want to put you to that task,
8 and I don't -- you know, not being familiar -- not having --
9 having the obvious not familiarity with all the details of
10 the case, I agree with you that that could lead to problems
11 one way or the other for one side or the other or maybe for
12 both sides. So I would suggest that, you know, you give us a
13 very limited amount of time to fish or cut bait on search
14 terms after you rule on the rest of the motion. And if we
15 can't do it, you know, we'll then -- then I guess it will be
16 up to the Court. But I believe we will be able to resolve
17 that particular issue.

18 THE COURT: Okay. Let me then allow the parties
19 to develop whatever record they want to beyond the briefing
20 as it relates to whatever categories set forth in the e-mail.
21 And I'll allow brief argument. Yeah. I'll allow brief
22 argument as to each of the remaining categories.

23 Ms. Malone, go ahead on the financial analyst
24 reports and drafts.

25 MS. MALONE: Of course. So actually, can I just

1 circle back real quick to the question of search terms? You
2 know, just given the way that this case has proceeded, I do
3 think it makes sense to get a definitive ruling because as
4 you pointed out, we'll just wind up in front of you again
5 making the same arguments, you know, briefing, and everybody
6 has to do this, you know, iteratively. And it just -- we
7 would be happy with whatever you would like to order.

8 So the -- all right. So the next set of
9 documents that Bain and Charlesbank have both outright
10 refused to produce is the financial analyst reports and
11 drafts thereof. You know, first they said that, you know,
12 they weren't sure they existed, then they would do a
13 reasonable search. But they, you know, reserved the right to
14 refuse to produce any drafts.

15 You know, we believe that, you know, draft
16 documents are highly relevant to the allegations. Well,
17 first of all, the documents themselves are highly relevant to
18 the allegations. And, you know, will show the evolution of
19 analysis of Varsity's value. So they're, you know, probative
20 and I mean -- yeah. The additional production burden is
21 almost zero, so it's warranted.

22 THE COURT: Response?

23 MR. KAISER: Yeah. So she's referring to
24 Request 12 to Bain and Request 13 to Charlesbank. And we've
25 told them that we don't have any documents, at least as

1 they've described them. These are third party Moody and S&P,
2 Standard and Poor's, analysis. This is not a public company.
3 We've done a reasonable search as we said we would. And we
4 don't -- Bain and Charlesbank don't think they have these
5 documents, so there's really nothing to this one.

6 THE COURT: Does that include drafts as well as
7 final versions?

8 MR. KAISER: They don't believe they have any of
9 them. And, you know, beyond that, if they did exist in Bain
10 and Charlesbank's files, they would be in the name in the
11 people we've talked about, not these 15 other people. But
12 they don't believe they have them. They don't believe they
13 exist, or if they do exist, they don't have them. They could
14 also go to the source, which is Standard and Poor's and
15 Moody's if they don't believe us. But again, we've done the
16 search, and we don't believe we have them.

17 THE COURT: Was there a discovery response
18 specific on that point, Mr. Kaiser, beyond what was in your
19 e-mails?

20 MR. KAISER: I don't think we've -- we have not
21 formally amended the request responses. And we could
22 certainly do that if that would make for a better record and
23 be the preference.

24 THE COURT: I think that would be required.
25 Okay.

1 Ms. Malone, would you be satisfied with a
2 document response -- request response detailing what
3 Mr. Kaiser has represented in his e-mail and what he said
4 today?

5 MS. MALONE: Yes, Your Honor. Yeah. A verified
6 response confirming that those documents don't exist under
7 Bain or Charlesbank's possession, custody or control. Yeah.
8 I mean, what else can you do? Yeah.

9 THE COURT: All right. Let's move on then to
10 the -- well, it's a settled issue, it sounds like. Joint
11 defense, joint sharing agreements. It looks like they also
12 said that there isn't a -- Bain's position is there's not
13 one?

14 MS. MALONE: Again, I mean, if there isn't -- you
15 can't produce a document that doesn't exist. So, you know,
16 if we get verified responses that, you know, state that the
17 documents don't exist, we'll be satisfied with those.
18 Otherwise, you know, it's our belief that, you know, we
19 allege a conspiracy, and the joint defense agreements are
20 needed to determine the amount of coordination -- I'm
21 sorry -- the amount of coordination between defendants, you
22 know, who otherwise have conflicted interests. You know,
23 that's, again, highly relevant to the allegations that are
24 made here. And those agreements have been produced in cases
25 where, you know, the terms go beyond mere boilerplate. So

1 yeah. If they don't exist, great. If they do, you know, we
2 would like to take a look.

3 MR. KAISER: Your Honor, there are two things
4 they put in here. Joint sharing, which I think they mean
5 judgment sharing. I'm not sure what -- if it's something
6 else, they should speak up. And they've been told there's no
7 judgment sharing agreement. So I think that's a moot point.

8 As far as joint defense agreements, I just cannot
9 reject more strongly what Ms. Malone just said. Basically
10 what she's saying is that despite the First Amendment to the
11 Constitution, our right to defend ourselves, they have an
12 entitlement to dig into our defense strategy, what we're
13 doing with the codefendants. That's just totally wrong.
14 Just totally wrong.

15 And by the way, the case that they cite to the
16 Court denied the very thing they're asking for, which is the
17 production of the joint defense agreement. So they have
18 brought nothing to this Court to justify ordering us to
19 produce a joint defense agreement. And it really strikes me
20 and that she would say that this is a -- that jointly
21 defending ourselves in a court proceeding is a conspiracy
22 under the antitrust laws. I mean, that's absurd, that really
23 is absurd.

24 So I would urge the Court, both for this case and
25 for all cases, to reject this just incongruous invasion of

1 the rights of the parties. And there's no cause for this.
2 There's no relevance to this. There's no one that says this
3 joint defense agreement is part of a conspiracy. That's
4 ridiculous.

5 THE COURT: Well, Mr. Kaiser --

6 MR. KAISER: I just have to say I think it's
7 irrelevant. It should be rejected.

8 THE COURT: Mr. Kaiser, just so I understand what
9 your response is so I don't misunderstand what you've said
10 and what you've written here in the e-mail. That what is it
11 that you say your clients don't have versus what is it that
12 you say your clients may or may not have but object to
13 producing if they did have it?

14 MR. KAISER: Yeah. So this thing called a joint
15 sharing agreement, which I think it's like a judgment sharing
16 agreement, I think is what they're getting at, which is where
17 the parties through litigation might say that if, you know,
18 there's a judgment, you'll pay 10 percent, I'll pay
19 20 percent or you'll pay zero percent, I'll pay a hundred
20 percent, whatever. That would be one thing. That doesn't
21 exist. So that's a moot -- that's moot.

22 You know, perhaps you could make the argument
23 that somehow that's relevant to what they're doing. Not for
24 the reasons that Ms. Malone said, but I could understand for
25 other reasons. But that's irrelevant because it doesn't

1 exist. Irrelevant to this discussion. As far as a joint
2 defense agreement where the parties to a case memorialize
3 that they're going to be working together on defending
4 themselves against claims brought against them, which by the
5 way, are joint and several liability claims, that may or may
6 not exist, but I don't think it's at all relevant. If it
7 does exist, shouldn't be ordered to be produced.

8 I also add that, you know, this request -- I
9 don't know if they now are just back to just wanting copies
10 of an agreement or if they want every document about the
11 agreement, which was the original request. Obviously, that's
12 just going straight into privileged documents across the
13 board, which is just incredibly expensive to deal with
14 requests like that. Outside counsel communications and
15 whatnot.

16 So to answer your question, no judgment sharing
17 agreement. May or may not be a joint defense agreement. I
18 mean, there is a joint defense agreement. I'm not going to
19 say -- I'm not going to be coy about it. There absolutely
20 is. And we are entitled to do that. They are not entitled
21 to see that. We're not using it to keep them from any
22 discovery or anything. And until we use it in that way, at a
23 minimum, it's just irrelevant.

24 THE COURT: Ms. Malone, response?

25 MS. MALONE: Well, so yes. To clarify, we were

1 speaking about it, you know, the judgment sharing agreement.
2 And again, you know, if we get a verified response that's
3 updated or amended to state that that doesn't exist, you
4 know, we'll be satisfied with that.

5 You know, as to the joint defense agreement, I
6 understand that Mr. Kaiser, you know, and his clients don't
7 want to produce that, but, you know, the fact remains that,
8 you know, courts have ordered the production of those
9 agreements when they go beyond mere boilerplate. We, you
10 know, won't know what it says until we see it. So they're
11 asking us to sort of just take their word for it. And, you
12 know, it bears on key issues here about the conspiracy. So,
13 you know, I would say, you know, prioritywise it's probably
14 on the lower end of what we're seeking. But, you know, we do
15 think it's relevant.

16 THE COURT: All right. Let's move on then to
17 your next request. Well, there's several of them: 5, 6, 7,
18 9, 10, 11, 12, 15 and 20; is that right?

19 MS. MALONE: Yeah.

20 THE COURT: Go ahead.

21 MS. MALONE: Yes. So I mean, the numbering is
22 slightly off between Bain and Charlesbank but, yes.
23 Essentially all of those requests, you know, relate to
24 financial information such as valuation analyses, profit and
25 loss statements, you know, documents relating to, you know,

1 acquisition analysis, due diligence, sale documents. You
2 know, they're all just related to the costs and the amount of
3 money that was made through this in which, you know, the
4 operational management exercised by both Charlesbank and
5 Bain, you know, bear on that.

6 So, you know, the arguments between all of them
7 are the same. That, you know, it's highly relevant to the
8 allegations that we're making here. That the individuals
9 we've identified, you know, would have this and would have
10 drafts, would have communications about it within their
11 custodial files. And so, I mean, I can go through them one
12 by one, but I don't want to waste your time with, you know,
13 making the same argument seven times.

14 THE COURT: Yeah. That's not necessary.

15 Response, Mr. Kaiser?

16 MR. KAISER: Well, we can only go with what's on
17 the page. She can say that they're all the same, which is
18 interesting in its own right because if they're all the same,
19 why are there seven of them? But Number 5 for both Bain and
20 Charlesbank, again, is all documents, communications
21 referring or relating to ownership and operation of Varsity.
22 That's not limited in the way she just said by a long shot.
23 That's every scrap of paper.

24 We don't think that's appropriate. We think it's
25 disproportionate. We think it's a lot of irrelevant

1 information, which means it's overbroad. And it's a pain in
2 the neck to put that all together. It's going to be a lot of
3 privileged information. One of the custodians that they're
4 pushing for is a lawyer at Bain for some reason that I still
5 can't fathom. So when you start with Request Number 5, you
6 know, it should just be thrown out as overly broad and unduly
7 burdensome and just then inappropriate, disproportionate.

8 When you get into some of the other requests,
9 again, they suffer from a lot of the same issues, but they
10 also start to veer into serious relevance issues. When you
11 look at, you know, and we can do that. I mean, Request 6 is
12 all due diligence documents. So anything that Bain may have
13 received in due diligence when they bought Varsity.

14 Well, again, the acquisition of Varsity by Bain
15 or the acquisition of Varsity by Charlesbank, that's not
16 alleged to be illegal. There's nothing said to be illegal
17 about that in this case. There's no allegations there. So
18 under what basis could we be put to the burden of having to
19 gather up all due diligence documents and communications
20 referring or relating to your acquisition of any interest in
21 Varsity regardless of whether documents were created by you
22 or by third parties, including without limitation and a long
23 list of things. It's just completely, again, overly broad,
24 unduly burdensome. It's just disproportionate.

25 And, you know, just to finish -- well, to go

1 through a few of the other ones. Request 7 has to do with
2 board materials. Well, we've said there is no board at
3 Charlesbank or Varsity, and that's been submitted to them
4 under oath in these proceedings. So those requests are moot.
5 There's no such thing as a board at either of the two
6 entities.

7 Request 9 has to do with acquisitions of
8 interests and camp producer. Well, now we're getting into
9 something that might be a little bit more in the line of
10 conceivably relevant, but again, we were dealing with
11 Request 5. If we're dealing with Request 9, that's a
12 different animal.

13 But on the subject of camp producers, they don't
14 allege a single camp producer acquisition in their case,
15 certainly not since Varsity was acquired by Bain. So for
16 Bain to go off and go to, you know, however many custodians,
17 nine custodians and look for documents regarding acquisitions
18 of camp producers when they didn't even allege one as being
19 illegal in their complaint is just kind of indicative of what
20 we're dealing with here. And it's just very disproportionate
21 and overly burdensome.

22 We did research, by the way, whether there were
23 any camp producers because we were trying to work with them
24 to kind of narrow this down a little bit. And there was one
25 camp producer that's been acquired since Bain owned Varsity.

1 It's a company called B2. That acquisition was for \$350,000
2 in 2019. And, you know, they didn't put that in their
3 complaint. They apparently didn't know about it or didn't
4 feel the need to allege it. Although they alleged a lot of
5 other stuff. But it just goes to show that rifling around in
6 Bain's files or documents about B2, a \$350,000 acquisition.
7 Again, very expensive. Disproportionate.

8 Now, Varsity is the one who made that
9 acquisition. Varsity is the one who has the documents about
10 that acquisition. And Varsity has produced a ton of
11 documents about that acquisition. So anything they want to
12 know about that acquisition, they certainly have in their
13 possession already from the Varsity production.

14 Now, can I say that there is no document in Bain
15 that may be slightly different from a document that Varsity
16 produced? Look, I can't. I'm not going to sit here and play
17 that game. But the reality is that \$350,000 acquisition is
18 extremely well covered and doesn't need to be going any
19 further.

20 Now, there's a couple of requests. One is about
21 loans and financing. Again, loans and financing of Varsity
22 have really essentially nothing to do with this case.
23 There's no allegation that Varsity did something illegal in
24 getting a loan or getting financing. I mean, they're a
25 company. They have to finance themselves, of course. But

1 why would we be going off and getting all documents and
2 communications at Bain, by the way, not at Varsity, but at
3 Bain. Referring our way into any loan or credit provided to
4 Varsity and then again, the same thing as respect to any
5 document about financing of Varsity.

6 So again, over the top. Very if -- I can't even
7 see the relevance, and that's their burden to establish
8 relevance. But even if it is relevant, the effort that would
9 need to be undertaken to do this is just so disproportionate
10 to the needs of the case.

11 There's another request, 15, which is
12 Charlesbank. 16, 15 to Bain. All documents referred or
13 relating to the valuation of any interest in Varsity. What's
14 the relevance of someone thinking about what Varsity is
15 worth? That's not what this case is about. This case is
16 about competition in the cheerleading space.

17 Varsity owns several other businesses besides
18 cheerleading, and to say that digging around and finding all
19 documents referring or relating to the valuation of any
20 interest in Varsity would be relevant to this case, at least
21 not overly broad and disproportionate to the case. Again, we
22 say to the Court that's not relevant, and they have to
23 establish relevance.

24 And then finally, one of the more curious ones
25 that went to both of them is Request 20, Charlesbank 21,

1 which seeks all documents and communications referring or
2 relating to compensation or remuneration paid to anyone at
3 Varsity. So again, this is just the utmost in fishing
4 expeditions. There's no allegations about this in the
5 complaint. You know, why we need to dig into the HSGHR files
6 or HR information at Bain they may have about Varsity people,
7 you know, based on really the compensation.

8 It really just beggars the mind what they think
9 we should be doing here. And, you know, they're asking us to
10 go into our HR files and all over Bain to look for these
11 things and at Charlesbank. And that just -- I don't see the
12 relevance, and even if it was tangentially relevant, again,
13 there's a proportionality standard in the federal rules now,
14 and this just doesn't even come close to meeting it.

15 And just to finish the thought. Request 10 to
16 Charlesbank, which is what causes the numbering not to be the
17 same is the request for all documents and communications
18 relating to your, that is Charlesbank's, sale of Varsity. So
19 now we're, again, not alleged to be illegal as to sale to
20 Bain. Not alleged to be illegal in any sense. And, you
21 know, this is just a very broad and strong request. It could
22 be many privileged documents regarding negotiating,
23 acquisition and sale agreements. You know, this alone is a
24 multihundreds of thousands of dollars of useless exercise in
25 getting to the bottom of that.

1 Now look, we've told them if they have something
2 that they don't think they have that they actually think is
3 pertinent to the case and that they need, we're all ears, but
4 we can't deal with these just outrageously broad requests,
5 particularly when you start getting into, you know, multiple,
6 multiple, multiple custodians. So at a very minimum, we need
7 these things to be tailored. And they just -- we've tried to
8 get them to do that for months and months and months, and
9 they just have not been willing to engage on that topic. So
10 we are here today because of them.

11 MS. MALONE: Your Honor, may I respond? Looks
12 like I need to go point by point after all.

13 THE COURT: You can. Although, as I mentioned
14 earlier, that I'll be deciding this on the papers. When I
15 got the parties' e-mail as of Friday, reviewed it this
16 weekend, I realized that there had -- there was no common
17 ground at all. And with that, that makes a hearing
18 definitely less helpful to me. And I even considered maybe
19 canceling the hearing today in light of that e-mail, but I
20 figured everyone had it on their calendar. I wanted to give
21 all parties an opportunity to be heard and make their record.
22 But I'll allow you to do that, Ms. Malone, but I'll probably
23 be wrapping up this hearing here shortly in the next few
24 minutes.

25 MS. MALONE: Okay. I will be brief, I promise.

1 So first of all, just as a general point, you
2 know, discovery isn't limited to, you know, exclusively
3 criminal, you know, and civilly liable acts. You know, the
4 scope of discovery is broad. And, you know, it's all
5 information that would lead to relevant discovery. So the
6 fact that, you know, conducting due diligence or acquiring a
7 company in and of itself isn't necessarily, you know, giving
8 rise to liabilities just, you know, based on that specific
9 act. It's not illegal. That doesn't mean that you can't
10 conduct discovery about it.

11 You know, as to the allegations that aren't in
12 the complaint, again, that's how discovery works. You make
13 it from, you know, allegations on information and belief and,
14 you know, conduct discovery that fully investigate those
15 claims and see if they hold water.

16 We know that Charlesbank and Bain were involved
17 in acquisitions, so the, you know, the requests that go to
18 accountant producers and other things are absolutely
19 relevant. The request about the sale, you know, documents
20 are central to our claims. I mean, that's how Bain got
21 involved. And, you know, there was a billion dollar profit
22 that was made over four years. So it's relevant.

23 You know, as to the valuations, you know, that's
24 necessarily based on the market share that a company has and,
25 you know, if it's big enough, its ability to, you know, raise

1 prices or throw its weight around, you know, as the 800-pound
2 gorilla. Finally, you know, the HR payments, I certainly
3 hope for Bain's sake that their HR files aren't all around
4 the company. But, you know, again, the burden there, you
5 know, is justified because, you know, the payment by, you
6 know, again Charlesbank, you know, to employees of Varsity,
7 it just -- yeah, it goes to the center of the conspiracy
8 claims.

9 You know, lastly, just the position that
10 defendants have taken where they're requiring us to identify
11 deficiencies in a production that doesn't exist in order to
12 talk about that production, it's -- I mean, it's iteratively
13 tautological. It requires a mind reader, not a lawyer. I
14 can't tell you what documents we don't have until I get at
15 least a set of documents. And we have received not a single
16 document responsive to our document requests, so...

17 THE COURT: All right. Okay. Well, I think that
18 pretty much wraps up the hearing for today. I'll take the
19 matter under advisement. I'll issue a written order on the
20 motions, and we'll go from there.

21 MS. MALONE: Okay.

22 THE COURT: All right.

23 (Adjournment.)
24
25

C E R T I F I C A T E

I, CANDACE S. COVEY, do hereby certify that the foregoing 51 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the FTR recording on the 6th day of December, 2021,, in the matter of:

Jones, et al.

vs.

Charlesbank and Bain, et al.

Dated this 11th day of March, 2022.

S/Candace S. Covey

CANDACE S. COVEY, LCR, RDR, CRR
Official Court Reporter
United States District Court
Western District of Tennessee